Supreme Court, U.S.
FILED
AUG 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PARSONS STEEL, INC., JIM D. PARSONS and MELBA L. PARSONS, and A. POPE GORDON, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

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St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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60 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the Anti-Injunction Statute, 28 U.S.C. §2283, an implied exception to the Full Faith and Credit Act, 28 U.S.C. §1738, so that a federal district court need not give full faith and credit to a state court judgment that a prior federal judgment does not bar a pending state court action?

2. Does the relitigation exception to the Anti-Injunction Statute, 28 U.S.C. §2283, grant a federal district court jurisdiction to review the judgment of a state court that a prior federal judgment does not bar a pending state court action?

3. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Statute, 28 U.S.C. §2283, to enjoin a pending state court proceeding which considered issues which were not, but arguably could have been, raised in an earlier federal action?

4. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Statute, 28 U.S.C. §2283, to enjoin a pending state court proceeding in the absence of a showing of entitlement to an injunction under general equitable principles?

5. Is a litigant bound by a judgment to which he is not a party where the parties to that judgment had no authority to represent him?

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On Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 and appears as Appendix A to the Petition for Certiorari; the opinion of the trial court, the United States District Court for the Middle District of Alabama, is unreported and appears as Appendix B to the Petition for Certiorari.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on December 3, 1984. A timely

Petition for Rehearing and Suggestion for Rehearing En Banc was filed and was denied on January 14, 1985. On January 24, 1985, the Court of Appeals entered its judgment. The Petition for Writ of Certiorari was filed on March 15, 1985, and granted on June 24, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States, Amendment V

No person shall be...deprived of life, liberty, or property, without due process of law;...

Full Faith And Credit Act, 28 U.S.C. §1738

The judicial proceedings of any court of such State...shall have the same full faith in credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ...

Anti-Injunction Statute, 28 U.S.C. §2283

A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

On February 15, 1979, Parsons Steel, Inc., (hereinafter "Parsons-Mobile") its wholly owned subsidiary, Parsons Steel Industries, Inc., (hereinafter "Parsons-Montgomery") and its shareholders, Jim D. Parsons and Melba L. Parsons (hereinafter collectively referred to as "Parsons") filed an action in the Circuit Court for Montgomery County, Alabama, against First Alabama Bank (hereinafter "Bank"), its loan officer, Edward Herbert (hereinafter "Herbert"), Michael

Orange (hereinafter "Orange"), and OSI, Inc., a corporation owned by Orange, *Parsons Steel Industries, Inc., et al. v. First Alabama Bank of Montgomery, N.A., et al.*, No. CV-79-179-G, Circuit Court for Montgomery County, Alabama, (hereinafter "State Action"). Parsons-Montgomery sought damages from Bank for a series of false representations beginning in January and continuing through December, 1978, breach of fiduciary duty, conversion, and violation of the Uniform Commercial Code in the sale of repossessed collateral. The alleged commercially unreasonable sale of substantially all the assets of Parsons-Montgomery occurred on January 17, 1979, and Parsons-Montgomery also invoked the equitable jurisdiction of the state court to set aside that sale and to obtain an accounting of the assets sold. (A. 55). Parsons-Mobile and Parsons sought separate damages they had incurred as a result of Bank's actions. Separate claims including fraud, breach of fiduciary duty and conversion were made by all Plaintiffs against Orange and OSI. (A. 44-59).

On April 5, 1979, Parsons Steel Industries, Inc. was adjudicated an involuntary bankrupt on petition of three creditors. (A. 292) *In Re: Parsons Steel Industries, Inc., a Bankrupt,* No. 79-173-N, United States Bankruptcy Court, Middle District of Alabama. A. Pope Gordon was appointed Trustee.[1] On June 4, 1979, the Trustee applied to the bankruptcy court for authority to employ Jere L. Beasley as attorney. The bankruptcy court ruled Mr. Beasley could not represent the Trustee because he represented Parsons-Mobile and Parsons and a conflict of interest might arise.[2] (A. 293-4). On July 27,

[1] The Trustee of this Estate was appointed under the former 11 U.S.C. §1, et seq. (Bankruptcy Act of 1898) in that the debtor was adjudicated bankrupt prior to October 1, 1979, the effective date of the "new" Bankruptcy Code (11 U.S.C. §101, et seq.) Mr. Gordon has since been appointed Bankruptcy Judge and his successor is Thomas A. McGregor. To avoid confusion Petitioners will continue to refer to Gordon as Trustee for purposes of this brief.

[2] The bankruptcy court was proven correct when it later became necessary for the Trustee to file suit against Parsons-Mobile and Parsons to attempt to collect more than $250,000.00 of fraudulent conveyances and preferential transfers.

1979, James Jerry Wood was appointed attorney for Trustee and has since served in that capacity. (A. 295).

In the interim, on May 30, 1979, Parsons-Mobile and Parsons filed a second action against Bank in federal court, *Parsons Steel, Inc., et al. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. 79-259-N (M.D. Ala. 1981) (hereinafter "Federal Action").[3] (A. 60-71). Parsons-Montgomery was not a Plaintiff in that lawsuit and neither Herbert, Orange, nor OSI was a Defendant. No damages were sought on behalf of Parsons-Montgomery. Parsons-Mobile and Parsons had no authority to file suit on behalf of Parsons-Montgomery since by that time that corporation had been adjudicated a bankrupt and a trustee appointed. (A. 292).

The Federal Action alleged *only* one claim, that Bank had conditioned an extension of credit upon the requirement of a change in management and ownership in violation of the Bank Holding Company Act (hereinafter "BHCA") 12 U.S.C. §§1971 et seq. Bank contended throughout the Federal Action that Parsons-Mobile and Parsons had no standing to bring that action since any damages were incurred solely by Parsons-Montgomery. (A. 259-62). The federal court repeatedly rejected that contention. (A. 359). Bank did not, however, seek to have the Trustee for Parsons-Montgomery joined as an indispensable party to the Federal Action. Neither did Bank suggest to either the state court or federal court that the claim was the same in both actions or that Plaintiffs were splitting their cause of action.

In its motion to dismiss (A. 259-260), motion for summary judgment (A. 261-62), and motion for reconsideration of order denying summary judgment (A. 265-66) Bank asserted that the federal court had no jurisdiction of the Federal Action. Because it had substantial doubts that the allegations of the

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[3] The district court on motion of all parties took judicial notice of the proceedings in the Federal Action and the entire record of that case is a part of the record here.

Federal Action constituted a violation of the BHCA the court ordered the issue of liability tried separate from the issue of damages. (A. 278). Bank continued to assert lack of jurisdiction in the pre-trial order, (A. 276) in its motion for directed verdict and again in its motion to vacate or dismiss after a jury verdict (A. 283) in Plaintiffs' favor on the issue of liability. (A. 289).

On June 17, 1981, the trial court granted Bank's motion for judgment n.o.v. and set aside the jury verdict. Although it had denied Bank's motion for directed verdict at the end of Plaintiffs' evidence and again at the end of all the evidence the trial court inexplicably held that Plaintiffs had failed to introduce sufficient evidence to sustain the jury's verdict on *any* element of a BHCA violation. (A. 72-88).

The United States Court of Appeals for the Eleventh Circuit affirmed but held that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242, 251 (11th Cir. 1982). On appeal Bank continued to assert that the district court lacked jurisdiction of the Federal Action and that Plaintiffs there lacked standing.

On October 24, 1979, Bank and Herbert moved to have the Trustee joined as an indispensable party to the State Action because his absence might leave the Defendant "subject to a substantial risk of incurring double, multiple or inconsistent obligations by reason of the Trustee's claim." (A. 216). The state court granted Bank's motion (A. 254). The Trustee applied to the bankruptcy court for permission to pursue that litigation and permission was granted. (A. 297). The bankruptcy court found that the State Action was an asset of the bankrupt estate and that it was in the best interest of the creditors to pursue the claim. (A. 217).

On March 25, 1982, Bank and Herbert filed answers in the State Action and asserted a counterclaim. (A. 241). Bank and Herbert denied the Plaintiffs' claims, asserted affirmative

defenses of waiver, estoppel, consent, lack of standing and res judicata. Bank filed a request for production of documents and issued third party subpoenas in preparation of its counterclaim.

On June 11, 1982, the Trustee amended his complaint in the State Action to allege commercially unreasonable behavior by Bank and Herbert in the sale of substantially all the assets of Parsons-Montgomery. (A. 35-36). Trustee filed an additional claim against Orange for the proceeds of a note to Parsons-Montgomery and for conversion of the cash value of a life insurance policy owned by the bankrupt. (A. 37).

Bank and Herbert presented their res judicata defense by motion for summary judgment to the state court which held that the federal judgment did not bar the State Action. (A. 219). The judge assigned to the case found it necessary to recuse himself and Bank and Herbert presented their res judicata defense by motion for summary judgment to a second state court judge (A. 227), who again denied the motion. (A. 250).

The State Action was set for trial and all parties filed contentions setting out the issues to be tried. (A. 221-26). A pro tanto settlement was reached with Defendants Orange and OSI on the eve of trial. Bank and Herbert then asserted a cross-claim against Orange and OSI in the State Action which is still pending in state court. (A. 237). Bank and Herbert also amended their answers to assert the additional affirmative defense that the settlement released them as well. (A. 239-40).

Beginning January 31, 1983, the State Action was tried for nine days. Bank and Herbert presented evidence in support of their several affirmative defenses. The jury returned verdicts in favor of Trustee in the amount of $2,000,000.00, in favor of Parsons-Mobile in the amount of $1.00 and in favor of Parsons in the amount of $2,000,000.00. (A. 251). The trial court entered a final judgment on the jury verdict. (A. 252). Bank and Herbert moved for judgment n.o.v. and for new trial. (A. 96-105).

Prior to a decision on their post-judgment motions in state court Bank and Herbert filed this action in federal district court seeking to enjoin Petitioners from pursuing the State Action judgment. Bank and Herbert's request for injunctive relief was premised on the Anti-Injunction Statute, 28 U.S.C. §2283, and their contention — previously rejected by the state court — that the judgment in the Federal Action precluded the State Action. (A. 1-100). Although not a party to the federal judgment, Herbert sought to use it to enjoin the judgment against him as well.

The district court in an unprecedented decision entered judgment in favor of Bank and Herbert and enjoined Petitioners from further prosecution of the State Action. (Pet.Cert. A-31). The district court made no finding that the injunction was necessary to "protect or effectuate" its prior judgment but instead based the injunction solely on its conclusion that the judgment in the Federal Action barred the State Action although recognizing the two actions asserted different causes of action.[4] The district court refused to give full faith and credit to the state court's decision on the res judicata issue. The district court also enjoined the Trustee for Parsons-Montgomery although he was not a party to the Federal Action. The district court made no finding that Trustee had been "virtually represented" by the parties to the Federal Action or that those parties had authority to represent him. The district court enjoined the judgment against Herbert as well although he was not a party to the Federal Action or the judgment there.

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[4] "A slightly different question arises in a situation where different causes of action arising from the same factual circumstances are alleged in a second suit." *First Alabama Bank v. Parsons Steel,* No. 83-V-181-N (M.D. Ala., June 15, 1983). (Pet.Cert. A-32).

The United States Court of Appeals for the Eleventh Circuit affirmed. *First Alabama Bank v. Parsons Steel,* 747 F.2d 1367 (11th Cir. 1984). The majority held that the Anti-Injunction Statute, 28 U.S.C. §2283 is an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that the district court was not required to give full faith and credit to the state court decision that the federal judgment did not preclude the State Action.[5] The majority further held that it was within the district court's discretion to enjoin the litigation of issues which were not but in its opinion "could have been" litigated in the Federal Action even though Bank awaited a decision by the state court before seeking the injunction. 747 F.2d at 1375. (Pet. Cert. A-13). The majority did not apply general equitable principles to the request for an injunction and found that the State Action was barred by the federal judgment only by applying a broad definition of claim preclusion which includes all causes of action arising out of the same "series of transactions."[6]

The majority held that the Federal Action plaintiffs were the virtual representatives of Trustee as to the fraud claim but remanded to the district court to determine whether virtual representation existed as to Trustee's Uniform Commercial Code claim. It is critical to note that neither court below found that the Plaintiffs in the Federal Action had authority to represent the Trustee. The majority's decision appears to have been based primarily on its erroneous conclusion that the Federal Action was pending at the time Parsons-Montgomery was ad-

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[5] Not only does the majority opinion represent the first occasion on which the Anti-Injunction Statute has been held to be an exception to the Full Faith and Credit Act, it represents the first implied exception to the Act *any court* has found.

[6] *See* Restatement (Second) of Judgments §24. This definition of claim for preclusion purposes was not adopted by the American Law Institute until after these actions were filed and has never been adopted by this Court.

judicated a bankrupt so that it became an asset of the bankrupt estate. 747 F.2d at 1379 (Pet. Cert. A-22). It is undisputed that the Federal Action was filed *after* Parsons-Montgomery was adjudicated a bankrupt and its shareholders had lost all legal authority to act for the corporation.

In a vigorous dissent, Judge James C. Hill reasoned that the Anti-Injunction Statute did not implicitly amend the Full Faith and Credit Act because the two acts can be construed harmoniously. For that reason the district court was required to give full faith and credit to the state court judgment. Judge Hill further opined that the district court erred in granting the injunction because the State Action and Federal Action involved "different parties and, arguably, different causes of action" so that an injunction was not necessary to "protect or effectuate" the federal judgment. In addition, Bank and Herbert awaited a judgment on the merits in state court before seeking an injunction which further "complicates the relations between state and federal courts. 747 F.2d at 1382. (Pet.Cert. A-29).

SUMMARY OF THE ARGUMENT

The injunction of a pending state court proceeding in these circumstances must be reversed. The district court erred in refusing to give full faith and credit to the state court judgment that the federal judgment was not a bar to the State Action. The plain wording of the Full Faith and Credit Act and this Court's decisions interpreting it clearly require full faith and credit in these circumstances. The Anti-Injunction Statute is not an implied exception to the Full Faith and Credit Act because the two statutes can be read consistently. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Until the state court rendered a final judgment Bank and Herbert could have sought an injunction authorized by the Anti-Injunction Statute. Neither does the passage the Anti-Injunction Statute suggest any "clear and manifest" intention to repeal the Full Faith and Credit Act.

The Court of Appeals' concern that failure to recognize the Anti-Injunction Statute as an implied exception would cause a party with a federal judgment to rush back to federal court any time a state court might rule on the res judicata issue is totally unfounded because where, as here, a litigant submits its res judicata defense to a state court in pretrial motions the orders denying those motions are not final judgments. Because 28 U.S.C. §1738 requires that full faith and credit be given only to final judgments, a litigant can seek a federal injunction at any time prior to a final judgment in state court.

The decision below impermissibly expands the limited jurisdiction of a federal district court to allow direct review of a state court decision in these circumstances. The district court's decision to grant an injunction was based solely on its decision that the earlier federal judgment precluded the State Action. The only way it could reach that decision was to reconsider the issue — already presented to the state court — and in effect reverse the state court judgment. This Court has exclusive jurisdiction to sit in appellate review of state court decisions. *Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923). Since this court will review those decisions only after review by the highest state court, state courts have a full opportunity to avoid federal interference. In addition this Court can exercise its ultimate authority to resolve conflicts between co-existing independent court systems without upsetting the balance of federalism.

The district court's injunction of a pending state court proceeding was barred by the Anti-Injunction Statute, 28 U.S.C. §2283. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970). The courts below improperly construed the Anti-Injunction Statute to authorize an injunction of a state court proceeding anytime a prior federal judgment precludes a state action. In this case, the final judgment in the Federal Action was that of the Court of Appeals for the Eleventh Circuit holding as a matter of law that the Bank's

actions did not violate the Bank Holding Company Act, a narrowly drawn prohibition against "tying arrangements." 12 U.S.C. §1972. No issue litigated in the Federal Action was repeated in the State Action. The plain wording of the Anti-Injunction Statute, its legislative history, and this Court's decisions which construe it limit an injunction to issues actually raised and litigated in the prior federal action. The only justification suggested for an injunction of issues which were not, but arguably "could have been" litigated — convenience to the winning party in federal court — is not important enough to form the basis for intervention into a state court proceeding.

Assuming *arguendo* the Anti-Injunction Statute did not bar the injunction in this case, principles of comity and federalism prohibited it. The district court's need to "protect or effectuate" its earlier judgment is at best minimal since no issue presented in the State Action was litigated in that judgment. There could be no greater intrusion into a state court proceeding than occurred in this case. The injunction came after a nine-day trial in state court in which the preclusive effect of the federal judgment was fully litigated. Such a minimal need to protect a judgment cannot form the basis for such an extensive intrusion into the state court function.

The injunction is also barred by the application of general equitable principles. There has been no suggestion that Bank and Herbert will not receive a fair and full adjudication of the res judicata issue in state court. They therefore have an adequate remedy at law. Whatever inconvenience they might suffer from prosecuting an appeal in Alabama appellate courts is not a sufficient basis for the injunction of a state court proceeding. The only possible way to conclude Bank and Herbert lack an adequate remedy at law is to hold that the Alabama appellate courts are inadequate to decide this issue. In our federal system state courts are the primary protectors of federal constitutional rights subject to review by this Court.

Bank and Herbert waived their right, if any, to an injunction of the state court proceeding by asserting claims of their own in the State Action and by submitting their defense on the merits along with the res judicata issue to the state court. The district court's decision that an individual cannot waive his right to seek an injunction in these circumstances is erroneous as a matter of law.

The Trustee should not be estopped from litigating his state court claims when he was not in privity or virtually represented by the plaintiffs in the Federal Action. In the Federal Action, the Trustee had no control, extended no authority for the plaintiffs to represent him, and no claims were made on behalf of the bankrupt corporation. The Federal Action was based on a very limited issue under the Bank Holding Company Act. The district court recognized the Trustee had no interest in the Federal Action by continuously denying the Bank's motions raising the issue of plaintiffs' standing. The district court has refuted its orders in that case and has now held that Parsons-Montgomery, and therefore the Trustee, was the primary party damaged by a violation of the Bank Holding Company Act.

In light of all of the circumstances, it would be unfair to give preclusive effect to the federal judgment so as to keep Trustee from fully and fairly litigating his state court claims. By depriving the Trustee of his opportunity to fully and fairly litigate his claims, the Trustee is being denied due process. The pretrial order in the Federal Action gave no clue to the Trustee that any of his interests were at stake in that action. The only issue decided in the Federal Action was that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. The Trustee's only chance to present evidence and arguments in support of claims and interest occurred in the State Action.

ARGUMENT

I. The District Court Erred In Refusing To Give Full Faith And Credit To The State Court Final Judgment.

A. The Anti-Injunction Statute Is Not An Implied Exception To The Full Faith And Credit Act.

The district court refused to give full faith and credit to the state court's determination that the federal judgment did not bar the State Action. The res judicata issue was presented by Bank and Herbert as an affirmative defense and a decision on that issue was necessary to the final judgment in state court. The court of appeals upheld the district court by finding the Anti-Injunction Statute, 28 U.S.C. §2283, an exception to the Full Faith and Credit Act, 28 U.S.C. §1738.

The foundation of our federal system is Article IV, §1 Constitution of the United States:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Our forefathers found that principle so important that one of the first acts of Congress was the passage of the Federal Full Faith and Credit Act. Act of May 26, 1790, Ch. 11, 1 Stat. 122. The Act, now codified as 28 U.S.C. §1738, provides in pertinent part:

> The judicial procedings of any court of such state...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State...

This Court has consistently held that §1738 requires federal courts to apply collateral estoppel to issues decided by state

courts. *Allen v. McCurry,* 449 U.S. 90 (1980); *Montana v. United States,* 440 U.S. 147 (1979); *Angel v. Bullington,* 330 U.S. 183 (1947). When a state court has first adjudicated an issue the application of collateral estoppel serves to "promote the comity between state and federal court that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. at 96.

It is quite clear that an exception to §1738 can be recognized *only* where a later statute contains an express or implied partial repeal. *Allen v. McCurry, supra; Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468 (1982).[7] The Full Faith and Credit Act is so fundamental to our federal system that prior to the Court of Appeals decision in this case authorization for a federal court to re-examine a state court judgment had been found *only* in the Federal Habeas Corpus Act 28 U.S.C. §2254 which expressly provides for review in certain narrow situations. No court had found an implied exception.

In *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982), this Court reaffirmed the cardinal principle that repeals by implication are not favored and taught that whenever possible statutes must be read consistently. A repeal by implication may be recognized only where the provisions of the two acts are in irreconcilable conflict.

The court of appeals disregarded a simple method of reading these two statutes consistently. Judge Hill, in dissent, articulated that method:

> I would conclude that Section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed the res judicata issue on the merits. In cases in which the

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[7] The court of appeals does not suggest that its unprecedented decision is founded on an express exception. 747 F.2d at 1376. (Pet. Cert. A-15).

> state court has reached the merits, I would hold that section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue.

747 F.2d 1381. (Pet. Cert. A-27)

The lack of any direct incompatibility between §2283 and §1738 is alone sufficient to negate an implied repeal. *Kremer v. Chemical Construction Company,* 456 U.S. at 470. Neither does the purpose of passing the Anti-Injunction Statute suggest any "clear and manifest" intention to repeal. Until the passage of the 1948 Amendment the statute was an absolute prohibition an injunction of a state court proceeding. The 1948 amendment was intended to restore the basic law as understood and interpreted prior to *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1921). Since no case prior to *Toucey* allowed a federal court to relitigate an issue previously litigated in a state court the amendment cannot be interpreted as granting that authority.[8]

The only policy reason articulated by the court of appeals majority to support its decision is its suggestion that if full faith and credit were given to a state court judgment a party with a prior federal judgment would be required to "rush back to federal court for a res judicata ruling any time there was a possibility that a state court might rule on the issue first." 747 F.2d at 1376 n.13 (Pet.Cert. A-16) This case clearly shows that concern is unfounded. Bank and Herbert presented their res judicata defense twice to the state court in pretrial motions. The orders denying those motions were *not* final judgments. Because §1738 requires that full faith and credit be given only to a final judgment a litigant could seek a federal injunction *at any time* prior to a final judgment in state court. Bank and Herbert had ample opportunity to do just that but instead chose to defend on the merits.

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[8] The legislative history of the Anti-Injunction Statute is discussed in more detail at pages 22-23 of this brief.

Both major treatises on federal practice and procedure support Judge Hill's analysis. Professor Moore suggests that a party in the position of Bank and Herbert has an *alternative* - either ask the federal court to enjoin state court litigation it contends is barred by a prior federal judgment or submit the matter to the state court and thereby assert an issue which can later form the basis for an appeal to this Court. Moore's Federal Practice, §0.408[3] (1983). *See also,* Wright, Miller and Cooper, Federal Practice and Procedure, §4404 at page 28-29 (1983).

The provisions of the Anti-Injunction Statute and the Full Faith and Credit Act are not in irreconcilable conflict. Neither the language nor legislative history of the Anti-Injunction Statute indicates an intent by Congress to repeal the Full Faith and Credit Act. The district court was required to give full faith and credit to the state court judgment. Because it failed to do so its injunction must be reversed.

B. The District Court Lacked Jurisdiction To Review A State Court Judgment.

The court of appeals majority's interpretation of the interaction of the Full Faith and Credit Act and the Anti-Injunction Statute impermissibly expands the limited jurisdiction of a federal district court to allow direct review of a state court judgment in these circumstances.

The Constitution of the United States, Article III, Section 1 provides:

> The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain or establish.

In establishing our federal court system Congress granted limited original jurisdiction to district courts[9] and limited appellate jurisdiction to courts of appeal.[10]

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[9] *See:* 28 U.S.C. §§1330-1363.

[10] *See:* 28 U.S.C. §§1291-1294.

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the supreme court was authorized to review on direct appeal the decision of state courts.

Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1970).

This Court has on more than one occasion upheld its exclusive jurisdiction to sit in appellate review of state court judgments. In *Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923) the losing party in a state court action sued in federal district court to have the state judgment set aside alleging a denial of due process of law. The district court dismissed for lack of jurisdiction and this court affirmed:

> Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment....To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

263 U.S. at 416.[11]

It cannot be denied that the district court exceeded its jurisdiction and violated this Court's decision in *Rooker.* Bank and Herbert submitted their contention that the federal judgment precluded the State Action to the state court. The state trial court considered that issue both in pretrial motions and at trial. A final judgment was entered rejecting that defense. The

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[11] Similarly in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) this Court held that the United States District Court for the District of Columbia had no jurisdiction to review proceedings of the District of Columbia Court of Appeals in a bar admission matter.

district court was able to grant the injunction only by reconsidering the res judicata defense previously rejected by the state court. Its action was an unauthorized exercise of appellate jurisdiction.

Important policy considerations underlie the decision to grant *only* this Court authority to review state court judgments. Since this Court will review such judgments only after review by the highest state court, state courts have a full opportunity to avoid federal interference. In addition, this Court, the highest court of the land, can exercise its ultimate authority to resolve conflicts between co-existing independent court systems without upsetting the balance of federalism. Where, as in this case, a federal district court reviews a decision of state court and reverses that decision the balance of federalism is destroyed.

Because the district court had no authority to exercise appellate jurisdiction over the state court decision its injunction must be reversed.

II. The District Court Erred In Enjoining A Pending State Court Proceeding.

A. The Courts Below Improperly Construed The Anti-Injunction Statute To Authorize An Injunction Of A State Court Proceeding Anytime A Federal Judgment Precludes A State Action Under Res Judicata Principles.

The Anti-Injunction Statute, 28 U.S.C. §2283, provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or *where necessary* in aid of its jurisdiction, or *to protect or effectuate its judgments.*

(Emphasis supplied). The statute "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding" unless it fits one of three specific exceptions

which must be narrowly construed. *Mitchum v. Foster,* 407 U.S. 225 (1972); *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970). In this case the courts below attempted to justify the injunction as "necessary...to protect or effectuate" the federal judgment.

It is clear beyond argument that no issue actually litigated in the Federal Action was presented in the State Action. The issues presented in the Federal Action are set out in the pre-trial order in that case.

> 5. Statement of Plaintiffs' Case: A. The Plaintiffs contend that the Defendant, a national banking association, violated Title 12 U.S.C. §1972, by placing certain requirements on Plaintiffs - the Defendant's customers - as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc. These conditions were not of such nature as to be usually provided to a bank by a customer in connection with a loan. Plaintiffs were at the time customers of Defendant for the purposes of 12 U.S.C. §1971 *et seq.,* and specifically §§ 1972 and 1975.

(A. 280).

Bank and Herbert's contention that any issue raised in the State Action was actually litigated in the Federal Action is impossible to reconcile with the issues outlined in the pre-trial order. A review of the district court's order denying motion for summary judgment (A. 359), Bank's jury argument (A. 408, 466), and the district court's instructions to the jury (A. 399, 471-72) confirm that these were the only issues litigated in the Federal Action.[12]

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[12] "And the burden is on the Plaintiffs in this case to reasonably satisfy you from the evidence — and that means the same thing as to prove by a preponderance of the evidence — in the case three things: that in connection with the fixing, the consideration of a loan, or ex-

Bank and Herbert argued to the court of appeals in this case that the district court's order granting judgment n.o.v. in the Federal Action constituted "findings of fact" on certain State Action issues. The court of appeals majority accepted that argument and used it to support its holding that the Trustee, a non-party to the Federal Action, was barred from pursuing his fraud claim under principles of collateral estoppel. 747 F.2d at 1371. The argument is erroneous for several reasons.

The trial court in the Federal Action granted Bank's motion for judgment n.o.v. and held that the Plaintiffs failed to introduce sufficient evidence to sustain a jury verdict on any element of a BHCA violation. (A. 72-88). No "findings of fact" were made. Any discussion of matters other than the issues presented was immaterial to the court's decision and mere dicta. In addition, evidence was presented to support the jury verdict on each of the elements of a BHCA violation.[13]

Finally, and most importantly, the court of appeals in the Federal Action recognized that the trial court erred in holding Plaintiffs' evidence was not sufficient to create a jury question but held:

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tension of credit, the Bank required the Parsons to provide some additional service to the Bank — that is, the transfer of the ownership of this business — and that the additional service required was other than a service related to and usually provided in connection with a loan.

It is up to you to decide whether or not the Bank . . . whether or not the Plaintiffs have proved these three elements by a preponderance of the evidence in this case." *Parsons Steel v. First Alabama Bank,* No. 79-249-N, Tr. 1006-1007 (A. 472).

[13] See testimony of Jim Parsons (A. 416-17) and June Neely Williams (A. 436-38), in the Federal Action. The district court's opinion shows on its face that the court impermissibly resolved issues of credibility.

> Taking the facts in the light most favorable to Plaintiffs, we find, *as a matter of law,* that a bank's requirement that financial control of an enterprise be placed in new hands when necessary to protect its investment before extending further credit does not constitute a violation of the statute, 12 U.S.C. §1972, absent evidence of a "tying" arrangement. We, therefore, affirm the judgment of the district court.

Parsons Steel v. First Alabama Bank of Montgomery, 679 F.2d 242, 244 (11th Cir. 1982). (Emphasis supplied). That judgment of the court of appeals is the final judgment in the Federal Action for preclusion purposes.

> A judgment affirmed on appeal has conclusive effect, but if the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as res judicata and as collateral estoppel are governed by the appellate decision.

1B Moore's Federal Practice §0.416[2].

The issues presented in the State Action are outlined in the statement of Parsons and Parsons-Mobile contentions. (A. 224-226). The claims made by the Trustee are discussed in detail at pages 43 and 44 of this brief. Each of the causes of action asserted in the State Action alleged only issues of state law. No issue presented in the State Action had been litigated in the Federal Action.[14]

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[14] The fact that no issue presented in the State Action was litigated in the Federal Action is alone enough to require reversal of the district court's injunction of the Trustee. The Court of Appeals held that the Trustee was barred by principles of collateral estoppel from litigating the fraud claim. Collateral estoppel can only apply to issues actually litigated in a prior proceeding.

The district court made no finding - nor could it on this record - that an injunction was necessary to "protect or effectuate" the federal judgment. Instead, the courts below avoided the express prohibition of §2283 by expanding the relitigation exception to authorize an injunction *any time* a prior federal judgment bars a state action under principles of res judicata. "It is now settled that the relitigation exception enables a federal court to enjoin state litigation which is precluded by the doctrine of res judicata." 747 F.2d at 1376. (Pet.Cert.A-16)

The plain wording of the Anti-Injunction Statute prohibits an injunction in these circumstances. Congress authorized an exception to the express prohibition against an injunction of a state court proceeding only in the limited circumstance where a state court proceeding could result in a judgment which would nullify or undermine the earlier federal judgment. Since in the instant case no issue of law or fact was decided in the Federal Action and later presented in the State Action it is impossible to conclude that the judgment in the State Action undermined or nullified the federal judgment. The injunction therefore cannot be justified as necessary to "protect or effectuate" the federal judgment.

The legislative and judicial history of the Anti-Injunction Statute also compels the conclusion that the mere applicability of the doctrine of res judicata is not sufficient to justify an injunction of a state court proceeding. The Anti-Injunction Statute had its beginnings as one sentence in the midst of §5 of the 1793 Federal Jurisdiction Act.[15] When Congress enacted the general codification of 1874, the provision appeared for the first time as a separate section and was worded as an absolute prohibition on "any court of the United States" with one noted ex-

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[15] Act of March 2, 1793, Ch. 22, §8, 1 Stat. 335.

ception.[16] Although there is no legislative history surrounding this revision the action of Congress in providing a separate section for the prohibition and making its language more specific and direct indicates a continuing and increasing interest in prohibiting interference with state courts.

The only change in wording of the statute since 1874 is the 1948 amendment[17] which occurred as a direct response to this Court's decision in *Toucey v. New York Life Insurance Company,* 314 U.S. 118 (1947). This revision is generally recognized as an attempt to restore "the basic law as generally understood and interpreted prior to the *Toucey* decision." Revisers Note, H.R. Rep. No. 308, 80th Cong. First Sess. A181-182 (1947). The 1948 amendment then is no authority for the court's action in this case since the law prior to *Toucey* contains no precedent for an injunction in these circumstances.[18]

On each occasion this Court has interpreted the Anti-Injunction Statute it has strictly construed the statute and narrowly construed any exception. *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511 (1954); *Mitchum v. Foster,* 407 U.S. 225 (1972); *Vendo Company v. Lektro-Vend Corporation,* 433 U.S. 623 (1977); *County of Imperial, California v. Munoz,* 449 U.S. 54 (1980). That construction recognizes the importance of the statute to our federal system.

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[16] Revised Statutes of 1874, Ch. 12, §720, 18 Stat. 134.

[17] The Anti-Injunction Statute was recodified at that time as 28 USC §2283.

[18] The relitigation exception was said by Justice Reed in his dissent in *Toucey* to have been established by this Court decisions in *Looney v. Eastern Texas Railroad Company,* 247 U.S. 214 (1918), *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 366, 367 (1921) and *Local Loan Company v. Hunt,* 292 U.S. 234 (1934). None of these cases allow an injunction of issues of law or fact other than those presented and decided in the earlier federal action.

Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) involved a factual situation remarkably similar to the case at bar. In *Atlantic Coast Line* the railroad sought an injunction in federal court against picketing at one of its switching yards. When the federal court denied the request the railroad immediately sought and obtained an injunction in state court against the picketing. Sometime later the union returned to federal court and obtained an injunction against the enforcement of the state court injunction. In enjoining the state court the federal court held that "the injunction of the state court, if allowed to continue in force, will effectively nullify this Court's findings and delineation of the rights of the parties." 398 U.S. at 292.

This Court reversed and held that the district court's injunction could not be based on a need to "protect or effectuate" the federal judgment because the question of the union's right to picket under state law had not been presented in that case. Since the courts in the case at bar held that the federal plaintiffs had an opportunity to present the State Action issues as pendent claims in the Federal Action a portion of this Court's opinion in *Atlantic Coast Line* is particularly relevant:

> While the railroad could probably have based its federal case on the pendent state law claims as well, *United Mine Workers v. Gibbs,* 388 U.S. 715, 16 L.Ed 2d 218, 86 S.Ct. 1130 (1966), it was free to restrain from doing so and leave the state law questions and the related issue concerning preclusion of state remedies by federal law to the state court.

Applying the rationale of *Atlantic Coast Line* to the case at bar makes clear that the injunction was improper. Like the railroad in *Atlantic Coast Line,* Petitioners presented questions of state law in the State Action which were not resolved in the Federal Action. The federal court merely determined that Bank's actions did not violate the BHCA. An injunction of the

state law issues was not necessary to "protect or effectuate" that judgment. Neither does the courts' determination that the state law claims could have been joined in the Federal Action authorize the injunction.[18]

The only justification Bank and Herbert suggest for an injunction of issues which were not but they contend "could have been" litigated is the concern voiced by Justice Reed in his dissent in *Toucey* that a failure to do so has the result:

> That a federal judgment entered perhaps after years of expense and money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication.

314 U.S. at 144, Reed, J. dissenting. This argument is weak at best since the preclusive effect of a judgment is routinely presented to the court in a subsequent proceeding and a court unfamiliar with the original proceeding normally decides that issue. The argument also impermissibly implies that the state court is an inadequate forum to consider the res judicata issue.[19]

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[18] The courts' determination that Parsons-Mobile and Parsons could have joined all the claims in the Federal Action is highly questionable. At the time the Federal Action was filed those claims were already pending in state court. There was admittedly no independent basis of jurisdiction over Orange or OSI in the Federal Action. In addition, neither Bank and Herbert nor the courts below have suggested how Parsons-Mobile and Parsons could have joined the Trustee in the Federal Action. Since the question of pendent jurisdictoin is a part of the issue of the preclusive effect of the federal judgment which is properly presented only to the state court it will not be argued in this brief.

[19] The remedy at law available to Bank and Herbert is discussed at page 29 herein.

More importantly the balance of federalism which the Anti-injunction Statute protects cannot be tipped by consideration of mere convenience to parties.

This Court has articulated the narrow construction which must be given to any exception to the Anti-injunction Statute much more clearly than this writer ever could:

> This cautious approach is mandated by the "explicit wording of §2283" and the "fundamental principle of a duel system of courts." We have no occasion to construe this section more broadly:
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> [It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. (citations omitted)

Vendo Company v. Lektro-Vend Corporation, 433 U.S. 623, 631 (1977). The courts below erred in expanding the relitigation exception to the Anti-Injunction Statute §2283. For that reason the injunction must be reversed.

B. Principles Of Comity And Federalism Prohibit An Injunction In This Case.

Assuming *arguendo* the district court had authority to enjoin the state court proceeding its injunction was nonetheless improper. The mere finding that a request for an injunction of a state court proceeding falls within one of the exceptions to the Anti-Injunction Statute does not end the court's inquiry. The Anti-Injunction Statute does not "qualify in any way the principles of equity, comity, and federalism as must [in its absence] restrain a federal court when asked to enjoin a state court proceeding. *Mitchum v. Foster,* 407 U.S. 225, 243 (1972).

In *Mitchum* this Court found that an injunction pursuant to 42 U.S.C. §1983 fell within the "expressly authorized by Congress" exception but remanded the case to the district court to determine whether or not principles of equity, comity and

federalism prohibited the court from exercising that authority. In the case at bar, Herbert and Bank have not suggested and neither court below has found any justification for the injunction beyond the determination that the Federal Action judgment barred the State Action. The mere decision that §1983 is an exception to the Anti-Injunction Statute is not alone sufficient to justify an injunction. Neither is the mere finding that a state action is barred by a federal judgment under principles of res judicata.

In applying principles of comity and federalism a district court should weigh the necessity of an injunction to "protect or effectuate" its earlier judgment against the extent of intrusion into the state court function. Where a state action could result in a judgment in direct conflict with an earlier federal judgment a significant intrusion into the state court function could perhaps be justified. *See, Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980). In the same manner an injunction might be justified where, although there is no direct conflict, relitigation of issues finally determined in an earlier federal proceeding is clear and the injunction is requested prior to expenditure of significant state judicial resources.

Petitioners submit that if principles of comity and federalism do not prohibit the injunction in this case no situation will arise where they will. No issue presented in the State Action was actually litigated in the Federal Action. A state court judgment finding Bank and Herbert guilty of fraud and commercially unreasonable behavior in violation of state law in no way nullified or undermined the earlier federal judgment that Bank did not violate the BHCA. In order to justify the injunction of an ongoing state proceeding the courts below found an implied exception to the Full Faith and Credit Act when none had been found before, expanded the relitigation exception to the Anti-Injunction Statute, allowed a non-party to the federal judgment (Herbert) to use that judgment to bar not only parties to it but other non-parties (Trustee), applied collateral estoppel to non-

parties to the Federal Action who admittedly had no authorized representative in that action and questionably applied a definition of res judicata[20] never accepted by this Court to bar what the district court recognized to be a separate cause of action.

It is impossible to reconcile the courts' actions with this Court's admonition that:

> [a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly manner to finally determine the contraversy.

Atlantic Coast Line, 398 U.S. at 297. The courts below resolved each doubt surrounding the propriety of the injunction in favor of intervening in a state court proceeding in which the state had invested substantial judicial resources. Principles of comity and federalism require that the injunction be reversed.

C. General Equitable Principles Prohibit An Injunction In This Case.

Even if their request for an injunction falls within an exception to the Anti-Injunction Statute and principles of comity and federalism do not bar it, Bank and Herbert must still demonstrate they are entitled to injunctive relief under general equitable principles. *Mitchum v. Foster,* 407 U.S. 225 (1972). Bank and Herbert recognized this requirement and allege they have no adequate remedy at law and irreparable harm (A. 7). They did not, however, introduce any evidence to support those allegations.

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[20] The question of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral estoppel is not presented to this Court. It is enough for purposes of this case that the question was sufficiently unclear that two state court judges heard Bank and Herbert's argument on the issue and rejected it. (A. 219-20).

Bank and Herbert have an adequate remedy at law. Their purported right to federal injunctive relief is premised on their contention that the federal judgment precludes the State Action under principles of res judicata. At the time this action was filed that issue was pending before the state court in Bank and Herbert's post judgment motions. Bank and Herbert can present their res judicata defense to state appellate courts and to this Court by Petition for Certiorari. There has been no allegation or finding that Bank and Herbert will not receive a fair adjudication of their res judicata defense in state court.

The only possible way to conclude that Bank and Herbert lack an adequate remedy at law is to hold that the Alabama appellate courts are inadequate to decide the res judicata issue. This Court has long recognized that in our federal system the state courts must be relied upon to enforce federal rights subject to review by this Court. The express restrictions on injunctions of state court proceedings are premised in part on the possibility that such injunctions can be readily interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles". *Huffman v. Pursue Limited,* 420 U.S. 592, 604 (1975).

The trial court did not discuss the question of the adequacy of Bank and Herbert's remedy at law. The Court of Appeals misconstrued the requirement of a lack of adequate remedy at law and stated: "no remedy at law exists to protect the Bank from having to pursue the State Action on appeal, just as no remedy at law exists to protect a party from having to relitigate an issue at trial." 747 F.2d at 1377, (Pet. Cert. A-17). Although presented in a slightly different context, this Court has held that "the 'cost, anxiety, and inconvenience of having to defend against a single criminal prosecution' was not the type of injury that could justify federal interference" into a state court proceeding. *Huffman v. Pursue Limited,* 420 U.S. at 602 quoting *Younger v. Harris,* 401 U.S. 37, 46 (1971). Any inconvenience

Bank might suffer in prosecuting an appeal to the Supreme Court of Alabama is not sufficient to make their remedy at law inadequate.

Bank and Herbert waived their right, if any, to seek an injunction of the state court proceeding. The trial court entered its judgment in the Federal Action in June, 1981. Bank and Herbert continued litigating in the State Action, asserted a counter-claim against Parsons and a cross-claim against Orange in the State Action and availed themselves of discovery to pursue those claims. Bank and Herbert presented their res judicata defense along with their defense on the merits to the state court. At the time the district court issued its injunction Bank and Herbert continued to assert their res judicata defense in state court in post-judgment motions.

The district court recognized that Bank and Herbert made a tactical decision to assert their res judicata defense in state court along with other affirmative defenses. (Pet. Cert. A-42). Perhaps Bank and Herbert wanted an opportunity for a jury to exonerate them of the allegations.[21] Perhaps they considered their other defenses stronger than their res judicata defense or felt that the state court plaintiffs could not meet the burden of proof. The district court held, as a matter of law, that the right to seek an injunction in these circumstances cannot be waived. "The public itself, as well as the parties, is interested in deterring relitigation of suits and no individual may waive the public interest." (Pet. Cert. A-42). The district court erred in failing to hold, based on the undisputed evidence that Bank and Herbert waived that right by presenting their case on the merits to the state court.

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[21] As this Court is aware the jury in the Federal Action resolved all questions of fact against Bank apparently believing the testimony of Parsons and rejecting Herbert's.

Bank and Herbert's conduct estopped them from seeking the equitable remedy of an injunction for other reasons as well. Recognizing that Parsons-Montgomery's interests were asserted in the State Action Bank and Herbert sought to have the Trustee joined as an indispensable party. (A. 216). Bank never sought to join the Trustee in the Federal Action and for that reason are estopped from now asserting that the Trustee's interests were involved at all in that case. Bank argued, at every stage of the Federal Action, that the court there lacked jurisdiction of Plaintiffs' BHCA claim. For that reason Bank and Herbert are now estopped from arguing that the federal court had jurisdiction of Plaintiffs' state law claim as well.

Indeed, the state court's rejection of Bank's contention that the federal judgment precludes the State Action may well have been based on estoppel principles. Bank and Herbert never suggested to the federal or state court that they contended the two actions were based on the same claim.

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

Restatement (Second) of Judgments §26 page 235.

Because the courts below failed to apply general equitable principles to the undisputed evidence the injunction must be reversed.

III. A Litigant Is Not Bound By A Judgment To Which He Is Not A Party Where The Parties To That Judgment Had No Authority To Represent Him.

A. The Trustee In Bankruptcy Should Not Be Estopped From Litigating His State Court Claims When The Trustee In Bankruptcy Was Not In Privity Or Virtually Represented By The Plaintiffs In The Federal Action.

The court of appeals opinion represents the first time a court has found virtual representation in the absence of a finding that the party to be estopped expressly or impliedly authorized a party to represent him in prior litigation.[22] Under *res judicata,* a final judgment on the merits bars further claims by parties, or their privies, based on the same cause of action, and under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. These interests are similarly implicated when non-parties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved. Preclusion of such non-parties falls under the doctrine of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action. The cause of action which a non-party has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right. *Montana v. United States,* 440 U.S. 147, 154 (1979).

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[22] See, *General Foods Corp. v. Massachusetts Department of Public Health,* 648 F.2d 784 (1st Cir. 1981); *Expert Electric, Inc. v. Levine,* 554 F.2d 1227 (2d Cir. 1977); *Charter Oak Fire Insurance Co. v. Sumitomo Marine Fire Insurance Co., Ltd.,* 750 F.2d 257 (3rd Cir. 1984); *Humphries v. Tann,* 487 F.2d 666 (6th Cir. 1977); *Del Mar Avionics v. Quinton Instruments Company,* 645 F.2d 832 (9th Cir. 1980).

The courts have had a difficult time in defining privity. Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by a judgment, although not formally a party to the litigation. *Expert Electric, Inc. v. Levine,* 554 F.2d 1227 (2nd Cir. 1977). It is unquestioned that the Plaintiffs in the Federal Action had no authority to represent the Trustee. The Federal Action was brought after Parsons-Montgomery was adjudicated bankrupt and the Trustee appointed. The Parsons and Parsons-Mobile did not attempt to represent Parsons-Montgomery; they sought only to recover damages they suffered separate and distinct from Parsons-Montgomery.

Furthermore, the different interests which the Trustee represented as compared to the Parsons and Parsons-Mobile were readily recognized by Judge Steele when he refused to appoint the attorney for Parsons and Parsons-Mobile as attorney for the Trustee, anticipating that "by virtue of his representation by Parsons Steel, Inc., a Mobile corporation, and Mr. Parsons individually, you may have some conflict of interest in the prosecution of a suit on behalf of the Trustee as well as in the prosecution of a suit (Federal Action) filed by Mr. Beasley on behalf of Parsons Steel, Inc., a Mobile corporation, Jim Parsons, individually against the same, or some of the same, defendants." (A. 293-94).

The sole beneficiaries from the Federal Action, had it been successful, would have been the stockholders of Parsons-Mobile and Parsons individually, certainly not the unsecured creditors of Parsons-Montgomery which the Trustee represents.

The district court and the court of appeals majority held that the damages caused by the "wrong" were the same in both the federal and state actions. However, the Federal Action was bifurcated by the district court with the liability issues being litigated first. Because the district court granted judgment n.o.v. in favor of the Bank, the issue of damages was never litigated.

The court of appeals, citing Wright, Miller & Cooper, Federal Practice and Procedure § 318 (1981) but no case law, stated that:"A finding of privity is no more than a finding that all the facts and circumstances justify a conclusion that non-party preclusion is proper."[23] Trustee contends that the district court was clearly erroneous in finding privity based on the facts in this particular case. Other cases from the First Circuit, Second Circuit, Third Circuit, Sixth Circuit, and Ninth Circuit have held that in order for non-parties to prior litigation to be in privity, the parties to prior litigation must have had implied or express authority to represent the parties now to be bound. There was not one shred of evidence that the Plaintiffs in the Federal Action had any authority, implied or express, to represent the Trustee.

Charter Oak Fire Insurance Company v. Sumitomo Marine Fire Insurance Company Ltd., 750 F.2d 257 (3rd Cir. 1984), held that an insurance company who had controlled litigation in the first action but was not a party to the first action was precluded from bringing a second action asserting the same claim for indemnity. Citing *Montana v. United States, supra,* the court said that the law has developed the doctrines of collateral estoppel and res judicata in order to

> protect...adversaries from the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. These interests are implicated when, as in this case, *non-parties control the litigation in the first action* and *then sue in their own right in the second.* (emphasis added)

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[23] *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 747 F.2d 1367, 1380 (11th Cir. 1984).

The key to the *Charter Oak* decision was that Charter Oaks controlled the litigation in the state court, and then asserted the same claim for indemnity on which it had been unsuccessful in state court in a second federal action. The conduct complained of was the same in both cases "failure to indemnify and pay cost of defense". The court said that the Charter Oaks participation in the state court litigation clearly rose to the level of control necessary to apply preclusion rules, citing *Ransberry Corporation v. Automatic Finishing Systems, Inc.*, 412 F.Supp. 1357, 1363-64 (E.D.Pa. 1976) (where the non-party actively and avowedly conducts the defense, manages and directs the trial at its expense and under its supervision, the outcome, which if favorable, would have redounded to his benefit, if adverse become sauce for the goose and gander alike and binding upon principles of res judicata) as authority.

Del Mar Avionics v. Quinton Instruments, 645 F.2d 832 (9th Cir. 1980) illustrates some factors which should be used by courts to determine whether a party had control of prior litigation, thus putting it in privity with a prior party to justify subsequent preclusion: whether the subsequent party (1) selected and paid counsel; (2) paid litigation expenses; (3) entered into a written indemnification agreement; (4) participated in settlement negotiations; (5) had control over the decision to appeal. Id. at 835.

The Bank moved to join the Trustee in the State Action. (A. 214). The Bank argued to the district court and court of appeals that the Trustee would have been the one to benefit from a favorable decision in the Federal Action; thus it should have been a party or litigated its claims in the Federal Action. The Bank, on several occasions in the Federal Action, asserted that Parsons-Mobile and the Parsons were not the proper parties before the court raising an issue of the standing of Parsons-Mobile and Parsons. The court rejected the Bank's contention in the Federal Action and ruled that Parsons-Mobile was the proper party. If Parsons-Montgomery (the Trustee) had been

the real party in interest or had been the one to benefit in the Federal Action, why did the Bank not move to join the Trustee in the Federal Action?

No claims were made on behalf of the bankrupt corporation in the Federal Action, and there was no reason for the Trustee to intervene. There is simply no evidence in the record to support the Bank and Herbert's contention that the Trustee made a conscious decision to refrain from joining the Federal Action. The Federal Action was based on a very narrow issue under the BHCA; basically whether the Bank had conditioned an extension of credit upon a requirement of a change in management and ownership in violation of the BHCA, 12 U.S.C. §§1971, et seq. The district court recognized that Parsons-Montgomery had no interest in the Federal Action by continually denying the Bank's motions raising the issue of Parsons and Parsons-Mobile standing. The same district court, paradoxically held in the instant case that "viewing barebone, though complicated, pleadings in retrospect" that Parsons-Montgomery was the primary party damaged by any alleged violation of the BHCA. (Pet. Cert. A-40, 41).

While it is clear that whether a non-party controlled the earlier litigation is a question of fact for the trial court, the district court and the court of appeals in the case at bar failed to utilize any factors found in extant legal precedents which would resolve this issue and merely stated in conclusory terms that the Trustee was in privity with the Parsons as to all the claims that were or should have been raised in the Federal Action.

Relying on established legal precedent, the Trustee asserts that control over prior litigation is essential to finding that privity existed. Trustee's interests were not adequately represented in the Federal Action. The unsecured creditors of the bankrupt corporation (Parsons-Montgomery) certainly were not adequately represented by Plaintiffs in the Federal Action..

Delta Airlines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 585 (5th Cir. 1983), held that the principle of virtual representation applies only "when the respective interests are closely aligned and the party at trial adequately represented those interests". Trustee's interests were neither closely aligned nor adequately represented by the parties to the Federal Action.

Another factor that was overlooked, ignored and glossed over by the court of appeals is the circumstances of the bankruptcy of the subsidiary corporation causing a profound alteration in the relationship between the stockholder/parent corporation and the subsidiary corporation. A trustee in bankruptcy is charged with specific duties, obligations, and responsibilities with respect to the estate. The interests of the stockholders of the bankrupt corporation are subrogated and often antagonistic to the interests of the creditors. Consequently, the relationship between the parent and subsidiary corporations (or a sole stockholder and his/her corporation) which might normally give rise to privity must be closely re-examined with the advent of intervening bankruptcy.

As erroneously noted by the court of appeals, the Federal Action was not pending in federal court when Parsons-Montgomery was adjudicated a bankrupt and a trustee appointed. (A. 292). Parsons-Mobile and the Parsons brought the Federal Action after Parsons-Montgomery had been adjudicated a bankrupt without consulting Trustee.

To further highlight the antagonistic or different interests the Trustee had to Parsons-Mobile and the Parsons, Trustee had sued Parsons and Parsons-Mobile for fraudulent conveyances in the bankruptcy court (A. 298-303). This was not mentioned by either the district court or the court of appeals, and this fact, alone, should weigh heavily in determining whether the Trustee was in privity with and adequately represented by the Parsons and Parsons-Mobile in the Federal Action case.

Once a corporation has been adjudicated a bankrupt and a trustee appointed, influence over the affairs of the debtor corporation by the officers and directors of that corporation become virtually non-existent. All powers, control, and function of the corporation vests with the trustee. *See,* Colliers on Bankruptcy, Vol. 4, §704 (15th ed. 1985).

Without any basis in fact, the Respondents in their previous briefs, the district court in its decision, and the court of appeals have all asserted that the Trustee's interests were adequately represented in the Federal Action. However, as one looks at the bankruptcy laws, such a holding is inconceivable. If the Plaintiffs in the Federal Action had recovered a judgment against Bank, the Trustee would not have been entitled to one cent. "The Trustee takes no title to property not belonging to the bankrupt except as permitted by the explicit provisions of the Act". Colliers on Bankruptcy, Vol. 4(A), §70.01 p. 84 (14th ed. 1983). *See also Matter of Jacoby,* 138 F.2d 42 (3d Cir. 1943).

As concerns collateral estoppel, the *Restatement (Second) Judgments,* §59(3)(b) (1982) highlights the unique position of the Trustee. "The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or creditor of the corporation." The comments to § 59 further underscore this distinction. "The rule of issue preclusion (collateral estoppel) should not be applied in such circumstances, or where its application would unfairly affect another person associated with the corporation, or third persons, *such as creditors,* or where the interests of the corporation and its owners were in such potential conflict with regard to the issue that it would be unfair to give preclusive effect to the prior determination." (Parenthetical expression and emphasis added). Comment (e) at 100.

B. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process.

The longstanding general rule of collateral estoppel is that it may not be asserted against a person not a party or in privity with a party to the prior action. *Hansberry v. Lee,* 311 U.S. 32, 40, (1940). This principle was reaffirmed in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), where this court stated:

> Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.

Ibid at 329.

This Court, in *Allen v. McCurry,* 449 U.S. 90 (1980), while affirming the underlying policies supporting issue preclusion, retained the one general limitation the Court has repeatedly recognized: "[T]he concept of issue preclusion cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity to litigate' that issue in the earlier case." 449 U.S. at 96.

It is always a prerequisite to the invocation of collateral estoppel that the issue determined in the prior action be identical to the issue in the litigation that is sought to be estopped. In cases involving estoppel of non-parties, this is particularly important. Note, *"Collateral Estoppel of Non-Parties",* Harvard Law Review, Vol. 87:1485, (1974).

> "In determining whether a non-party's interest in litigating an issue is identical to one litigated in a previous action, the crucial element is the extent to which the non-

> party may be thought to have had a vicarious day in court. Two aspects of this question can be identified. First, to what extent did the non-party participate in or control the prior litigation; second, to what extent can the issue be said to have been fully and fairly litigated in the first action in a manner which protects the interest of the non-party." *Ibid* at 1500.

This Court, in *Hansberry v. Lee,* 311 U.S. 32, 42 (1940), reasoned that the due process requirement of adequate representation was not satisfied unless the interests of the non-party were substantially similar to the interests of the parties to the prior action. The district court and the court of appeals, by erroneously finding the interests of the Trustee were the same as the Parsons and Parsons-Mobile in the Federal Action, have denied the Trustee his right to litigate. Trustee has been denied due process.

Absent privity, relitigation of identical issues by persons who did not participate in the prior proceeding is allowed. The underlying rationale for this is that the parties seeking relief did not receive fair representation in the earlier suit because of the diverse nature of the interests involved in the various stages of litigation; consequently, the constitutional requirement of due process mandates relitigation.[24] Cordell, *"The Expanding Scope of the Res Judicata Bar",* 54 Texas L.Rev. 527 at 529 (1976).

Support for the Trustee's position that he did not have a full and fair opportunity to litigate his case in the Federal Action can be found in the case of *Nevada v. United States,* 462 U.S. 1104 (1983).

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[24] Since no identical issue actually litigated in the Federal Action was repeated in the State Action this Court need never reach the question of whether or not the Trustee had a full and fair opportunity to litigate his case in the Federal Action. See pages 19 - 21 of this brief.

This Court in *Nevada* drew the distinction between the "fastidious standards of a private fiduciary who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent and where Congress has decreed that the Government must represent more than one interest". *Ibid* at 528. This Court noted that the Government was not in the position of a private litigant or private party under traditional rules of common law or statute. Parsons and Parsons-Mobile had no authority to represent the Trustee in the Federal Action. Trustee contends that the issues litigated in the Federal Action were very different from those found in the state action but even if they were the same, Trustee insists the privity requirements necessary to preclude Trustee cannot be found. The Parsons and Parsons-Mobile interests were in conflict with those of the Trustee. This Court in *Nevada* seemed to intimate that in situations involving private litigants a party in the position of trustee would not be precluded from litigating a second action involving the same issues. There would be no privity as to preclude a party such as trustee when the persons supposedly "vicariously represented" were represented by parties who had a conflict of interest with those persons represented.

In *Montana v. United States,* 440 U.S. 147 (1979), this Court held that under the doctrine of collateral estoppel, the United States was precluded from challenging in federal court the constitutionality of the Montana gross receipts tax upon contractors of public but not private construction projects since (1) the United States, although not a party to the state court litigation in which the constitutionality of the tax had been upheld, had exercised control over that litigation by directing and financing it and filing an amicus brief and, (2) the constitutional question expressly and definitely presented in the federal court action was the same as the action litigated and adjudged adverse to the Government in the state action. This Court stated that the Government had a sufficient "laboring oar" in the state court litigation, and there were no special circumstances justifying an

exception in the general principle of estoppel. Again, this Court's decision turned on control of the prior state action and involvement by the United States in that state court action. In the instant case, the trustee played no role in the decision to file the Federal Action, could have had no control if he had wanted to, did not participate in any manner in that action, and contributed nothing toward the plaintiff's attorney fees or expenses. Trustee did not participate because there was no interest involving the Trustee.

The district court and the court of appeals relied heavily on the case of *Woods Exploration and Producing Company v. Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971) to support the decision that "recovery in the Federal Action would have compensated Plaintiffs (including the Trustee) for the total harm suffered and the Plaintiffs were afforded an opportunity to allege state grounds which constituted the same cause of action as the federal proceeds" (parenthetical expression added). The case at bar can easily be distinguished from *Woods.* The Bank and parties attempting to invoke collateral estoppel against Trustee focus their arguments on the cost to be incurred by them if estoppel is not allowed. Significantly, the costs of nine days of state court trial have already been incurred by all parties. "The relation of rules of practice to the work of justice is intended to be that of a handmaid rather than a mistress, and a court ought not to be so far bound and led by rules ... as to be compelled to do what will cause injustice in the particular case." Clark, *"The Handmaid of Justice",* 23 Wash. U.L.Q. 297 (1938).

The case at bar is an extraordinary case with unusual circumstances. The complaint in the Federal Action alleged violations of the BHCA. Plaintiffs' contentions were outlined in the pre-trial order as follows:

> "by placing certain requirements on Plaintiffs, the Defendants customers, as conditions to making additional loans and extending credit to Parsons Steel Industries, Inc.

> These conditions were not of such a nature as to be usually provided to a bank by a customer in connection with a loan. The specific conditions placed on the Plaintiffs consisted of requiring (1) a change in the management of Parsons Steel Industries, Inc. and (2) the sale or agreement to sell a minority of the capital stock of said corporation to Michael Orange, a third party secured by the Defendant and unknown to the Plaintiffs."

(A. 280). Herbert, Orange and OSI were not parties to the Federal Action.

The pre-trial order in the Federal Action gave no clue to the Trustee that his interests were at stake in the Federal Action, and the district court recognized at that time that the Trustee had no interest which was to be protected in the Federal Action. The Trustee asserts that Bank recognized that the Federal Action and the State Action involved different parties and different issues. The principal rights and duties of the Bank to the three Plaintiffs in the Federal Action according to the pre-trial order involved only those rights and duties specified under the BHCA. 12 U.S.C. § 1971, et seq.

The principle test for determining whether the causes of action are separate is whether the principle rights and/or wrongs are the same in each case. *Ray v. Tennessee Valley Authority,* 677 F.2d 818, 821 (11th Cir. 1982). The wrongs alleged in the State Action involve (1) fraud by all defendants and the failure to act in good faith with respect to Parsons-Montgomery (Count I of Plaintiffs' Complaint A. 44); (2) the breach of responsibility to safeguard the interest of Parsons-Montgomery (Count II A. 54); conversion by Orange and OSI, of Parsons-Montgomery's assets (Count IV A. 55); wrongful detention by Orange and OSI of Parsons-Montgomery's assets (Count V A. 56); conversion by Bank and Herbert of the Parsons-Montgomery's assets (Count VI at A. 33); fraudulent conspiracy by all Defendants resulting in fraud against the

unsecured creditors and the wrongfully secret conversion of all Defendants of the assets of Parsons-Montgomery (Count VIII at A. 34); the sale of all of the assets of Parsons-Montgomery by Bank in a commercially unreasonable manner in that the assets were sold to OSI at private sale at a price predetermined by the Bank and OSI with no regard to the actual value of the assets (Count IX A. 26); breach of contract and promissory note against Orange and OSI (Count X A. 27); conversion of a life insurance policy owned by Parsons-Montgomery (Count XI A. 28). Parsons-Montgomery also sought an accounting from the Defendants (Count III A. 55) and to overturn the sale to OSI.

In contrast to the Federal Action, the causes of action of the Trustee in the State Action sounded in fraud not only against the Bank but also Orange, OSI and Herbert. The Trustee had additional claims against the Bank and OSI for violation of Alabama's version of the Uniform Commercial Code, particularly Code of Alabama §7-9-504 and §7-9-507, for a commercially unreasonable sale. No allegations of violation of the BHCA were made by Trustee against the Bank. Although some of the same or similar facts were alleged in the two complaints, there can be no doubt that the Trustee's causes in the state court case were different and distinct from those asserted by the three plaintiffs in the BHCA action.

The Bank's position, adopted by the district court and court of appeals, is that res judicata or collateral estoppel would preclude a party from raising a claim or issue in subsequent litigation simply because that party could have raised the claim or issue under the liberal joinder rules of the Federal Rules of Civil Procedure. Collateral estoppel will bar an issue *only* if that issue was a necessary, and not incidental or collateral, part of the same cause of action that was asserted in the prior litigation. The Eleventh Circuit, in affirming the district court's judgment n.o.v. in the Federal Action, simply found that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. 1B Moore's Federal Practice states the Trustee's position as follows at paragraph 0.443[5.1]:

> Even though an issue was raised and fully litigated in a prior action, a finding on the issue was made by the court preliminarily to rendition of judgment, *the issue is not concluded by the resulting judgment unless a finding made on the issue was, at least alternatively, necessary to the judgment rendered. Thus, an incidental or collateral determination of an issue that was not material in the prior action does not foreclose reconsideration of that issue in later litigation in which the issue is material.* (emphasis added)

In the case at bar, the plaintiffs to the Federal Action had no authority to represent, and did not attempt to represent, Parsons-Montgomery. Although the Bank on several occasions argued that the Federal Action Plaintiffs had suffered no damages separate from the bankrupt corporation (Parsons-Montgomery), and, therefore had no standing to bring that action in the district court, the district court rejected that argument time and time again. Since no claims were made on behalf of the bankrupt corporation in the federal action, there was no reason for the Trustee to intervene. The Trustee in this case has been denied due process of law. His only chance to present evidence and arguments on his claim occurred in the State Action. The State Action is the only forum where the Trustee had an opportunity to "fully and fairly" litigate his claims.

CONCLUSION

The decision below constitutes an intrusion into the state court function greater than this Court has ever allowed. In order to justify the injunction of an ongoing state court proceeding the courts below found an implied exception to the Full Faith and Credit Act where none had been found before, expanded the relitigation exception to the Anti-Injunction Statute, allowed a non-party to the federal judgment to use that judgment to bar not only parties to it but other non-parties as well, applied collateral estoppel to non-parties who admittedly had no authorized representative in the prior action and ques-

tionably applied a definition of res judicata never accepted by this Court to bar what the district court recognized to be a separate cause of action. The courts erred, not only in their ultimate conclusion, but in each of the steps taken to reach that conclusion.

Since the founding of this country ours has been a system of independent, equal, co-existing court systems. Because the injunction in this case destroys the balance between those two systems it must be reversed. Petitioners respectfully request that this Court reverse the injunction and remand this case with instructions that it be dismissed with prejudice.

Respectfully submitted,

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APPENDIX

APPENDIX A

Date	Forum	Action Taken
2/15/79	State Circuit Court Montgomery County, Alabama	Complaint filed in State Circuit Court on behalf of Parsons Steel Industries, Inc., Jim Parsons, Melba Parsons and Parsons-Mobile against Bank, Herbert, Orange and OSI, Inc.
4/5/79	U.S. Bankruptcy Court, Middle District of Alabama, Northern Division	Parsons Steel Industries, (Parsons-Montgomery) adjudicated involuntary bankrupt
5/30/79	U.S. District Court, Middle District of Alabama, Northern Division	Complaint filed by Jim Parsons, Melba Parsons and Parsons-Mobile against Bank and Herbert alleging violations of Federal Bank Holding Company Act
6/17/81	State Circuit Court Montgomery County, Alabama	Bank and Herbert's motion to join Trustee as an indispensable party in the State Action
6/17/81	U.S. District Court, Middle District of Alabama, Northern Division	Order in Federal Court case granting Bank's motion for n.o.v.

6/11/82	State Circuit Court Montgomery County, Alabama	Trustee's Amendment to Complaint in State Action alleging commercially unreasonable behavior in sale of assets by Bank and Herbert
1/6/83	State Circuit Court Montgomery County, Alabama	Second state court judge denies Bank and Herbert's motion for summary judgment on res judicata principles
1/31/83	State Circuit Court Montgomery County, Alabama	Trial begins in State Action
2/9/83	State Circuit Court Montgomery County, Alabama	Verdict rendered against Bank and Herbert
2/24/83	State Circuit Court Montgomery County, Alabama	Motions for new trial or in the alternative judgment n.o.v. filed by Bank and Herbert
3/7/83	U.S. District Court, Middle District of Alabama, Northern Division	Complaint and Request for Preliminary and Permanent Injunction filed by Bank and Herbert